No. 47425-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY JOHNSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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A. Did the trial court err when it found that Johnson had been properly given his *Ferrier* warnings outside his residence?

B. Did the trial court err when it found Johnson's consent to search his residence was knowingly, intelligently and freely given after being properly advised of his *Ferrier* warnings by the officers?

II. STATEMENT OF THE CASE

On January 22, 2014 Centralia Police Officer Haggerty received information from a cooperating arrestee that Johnson was selling large amounts of methamphetamine from a 29-foot trailer that was secured under a pole barn located at 1242 North Fork Road. RP2[1] 8-9; CP 24-25, 28. Officer Haggerty, Centralia Police Officer Withrow and Lewis County Sheriff's Deputy Kimsey went to the North Fork Road property in Lewis County to continue the investigation. RP2 8-9; CP 24-25, 28-29. Deputy Kimsey was present, in part, because the Centralia Police officers had no official jurisdiction at Johnson's residence. RP2 9; CP 29.

Officers Haggerty and Withrow arrived at Johnson's residence wearing street clothes and driving their undercover

[1] The State will cite to the verbatim report of proceedings of the suppression hearing and the stipulated facts bench trial as RP2. In an attempt to keep with the cites as Appellate counsel did in their briefing, the State will cite to the transcripts of the omnibus hearing (2/26/15) and trial confirmation (3/12/15) as RP1 and the volume containing the sentencing hearing (4/1/15) as RP3.

vehicle, while Deputy Kimsey was in uniform and in his marked police vehicle. RP2; CP 29. Officer Haggerty and Withrow were aware that Johnson had security cameras so they parked in front of a camera and turned up their music in an attempt to lure out Johnson. RP2 37; CP 29.

Johnson did not respond, Officer Haggerty and Withrow approached the barn and summonsed Johnson from within. RP2 10, 31-32, 38, 52; CP 25, 29. Officers Haggerty and Withrow contacted Johnson and asked to speak with him outside of the barn, to which Johnson complied. RP2 10, 31; CP 25.

Once outside, Johnson was informed of why law enforcement was contacting him, and that they were interested only in Johnson's source of methamphetamine. RP2 10; CP 25, 29. Officer Haggerty informed Johnson that things would go smoothly if Johnson cooperated with law enforcement during their contact. RP2 15; CP 25.

Officer Haggerty asked Johnson how much methamphetamine he had inside his trailer, to which Johnson indicated he had approximately two ounces. RP2 32; CP 25, 28. Johnson also admitted to having a digital scale and packaging material. CP 25, 30.

Officer Haggerty completed a Consent to Search Form (*Ferrier* warnings) and verbally summarized the contents of the form. RP2 12-14; Ex. 4;[2] CP 25, 30. Officer Haggerty also allowed Johnson to read the form, who agreed with the terms orally and in writing by providing his signature. RP2 12-14; Ex. 4; CP 25, 30. During this time, Johnson verified that he owned the trailer. CP 25.

Officer Haggerty and Johnson entered the trailer, where Johnson remained not in handcuffs. RP2 17; CP 25, 30. While inside the trailer, Johnson pointed out a small closet near the bed in the trailer. CP 25. Inside of a white glove, Johnson stated there would be methamphetamine. CP 25. Officer Haggerty picked up the glove, shook it, and discovered two baggies containing a crystalline substance. CP 25.

On the dresser, Johnson pointed out a digital scale, which Officer Haggerty used to weigh out the two baggies. CP 25. Each baggie weighed approximately one ounce. CP 25.

Along with the scale and two baggies of crystalline substance, Officer Haggerty located a pipe, a serving dish with residue, a scoop, and a plethora of packaging material inside the trailer. CP 25. Between an in-dash CD player and other items,

[2] The State will be filing a supplemental designation of Clerk's papers, designating Exhibit 4 from the suppression hearing, the signed Consent to Search form.

Officer Haggerty located a stack of $20 bills that totaled $1100. Officer Haggerty asked Johnson if he had any other money, to which Johnson handed Officer Haggerty his wallet. CP 25-26. Inside of the wallet was another $1934. CP 26

At the end of the consent search, Officer Haggerty located two ounces of methamphetamine, a digital scale, packaging, and over $3000 in U.S. currency. CP 26. Johnson also admitted to selling drugs to at least five people, and admitted obtaining a quarter of a pound per week from a local source. CP 26.

The crystalline substance was sent to the WSP crime lab for testing, and verified as methamphetamine. CP 26. One of the bags weighed 27.7 grams. CP 26.

The State charged Johnson with Possession of Methamphetamine with the Intent to Deliver. CP 1-3. Johnson filed a motion to suppress, alleging warrantless search and insufficient advisement of his *Ferrier* warnings. CP 4-10. The trial court found the warrantless entry and search lawful, *Ferrier* warnings properly given and denied the motion to suppress. CP 28-31, 21. Johnson was found guilty at a stipulated facts bench trial. CP 11-20, 24-26. Johnson timely appeals his conviction. CP 42.

The State will further supplement the facts in the argument section below.

III. ARGUMENT

A. JOHNSON CONSENTED TO THE SEARCH OF HIS HOME AFTER BEING PROPERLY GIVEN HIS *FERRIER* WARNINGS.

Johnson argues the police officer's search of his residence was unlawful because it was a warrantless search that does not meet one of the carefully guarded exceptions. Brief of Appellant 11-21. Johnson argues the search was impermissible on two grounds. First, officers entered the barn prior to getting consent to search, which makes the subsequent search illegal. Second, the State did not prove that Johnson's consent to search was lawfully given. Johnson is incorrect on both matters. The officers obtained consent to search Johnson's residence prior to entering it and his consent to search was knowing and voluntary. This Court should affirm the trial court's ruling and Johnson's conviction.

1. Standard Of Review Regarding Finding Of Facts And Conclusions of Law.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the

record supporting the challenged facts, those facts will be binding on appeal." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted).

The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

In the present case Johnson only assigns error in part to Finding of Fact Six from the suppression hearing, and only to the extent that the finding suggest the officers refrained from entering Johnson's home prior to providing *Ferrier* warnings. Johnson fails to assign error to the conclusions of law. Given Johnson's arguments on appeal, the State will assume this was an oversight.

2. The Washington State Constitution Disfavors Warrantless Searches.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not have government unreasonably intrude on one's private affairs. U.S. Const. amend IV. Article One, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson,* 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Therefore, warrantless searches are per se unreasonable unless the State can prove that one of the exceptions to the warrant requirement is present. *State v. Ferrier,* 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Exceptions to the warrant requirements are "jealously and carefully drawn." *Ferrier*, 136 Wn.2d at 111 (internal quotations and citations omitted). Consent is one such exception to the warrant requirement. *Id.*

i. The officers did not enter Johnson's home or the curtilage of Johnson's home prior to speaking to him outside the barn regarding whether he would consent to a search of his trailer.

The officers did not go into the barn prior to Johnson coming out to initially speak to them. Johnson was summonsed out by the officers, contrary to his contention in his appeal.

Constitutional protections against warrantless searches apply most strongly to a person's home. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The Fourth Amendment's "umbrella" of protection extends to a home's curtilage. *Ross*, 141 Wn.2d at 312, *quoting State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990). A person has a legitimate expectation of privacy in the curtilage of their dwelling. *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990).

A police officer conducting legitimate police business is permitted to "enter areas of the curtilage which are impliedly open, such as access routes to the house." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Legitimate police business includes investigating possible criminal activity. *State v. Ross*, 141 Wn.2d 304, 314, 4 P.3d 130 (2000). A police officer is allowed to intrude when he or she acts in the same manner as a reasonably

respectful citizen who enters onto the property. *Seagull*, 95 Wn.2d at 902 (citation omitted). "[A] substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation" and violate a person's right to privacy. *Id.* 903.

To determine whether an officer's actions were reasonable the reviewing court evaluates the facts and circumstances of the case. *Id.* The court will consider the nature of property, whether it was fenced, gated or displayed signage that expressed the resident's intent to keep the property closed off to the public. *State v. Johnson*, 75 Wn. App. 692, 705, 879 P.2d 984 (1994). Other non-exclusive factors the court may consider are, whether the officer was acting openly, the time of day the officer entered onto the property, the route taken by the officer and if the officer actually attempted to contact the occupants of the residence. *Seagull*, 95 Wn.2d 903-06. An open garage has been found to be within the curtilage of a home. *State v. Dyreson*, 104 Wn. App. 703, 17 P.3d 668 (2001).

The unequivocal testimony from Officer Withrow and Deputy Kimsey was clear, the officers did not go into the barn. RP2 32, 38, 52. Officer Withrow testified that Johnson was inside the barn when

officers arrived. RP2 31. "When we first pulled up, he [,Haggerty,] had the stereo up and then went and knocked and asked for him [,Johnson,] to come out." RP2 31-32. According to Officer Withrow's testimony, Johnson came out to the front of the barn and spoke to the officers. RP2 32. When asked on cross-examination if they went into the barn Officer Withrow responded, "No." RP2 38. Trial counsel then asked, "So if you didn't go into the barn, how did you get Mr. Johnson out?" RP2 38. Officer Withrow replied, "Knocked on the outside and asked and he just came out." RP2 38. This testimony is unequivocal. The officers did not go into the barn.

Deputy Kimsey had a similar account of the interaction, although he acknowledged he became distracted by another person pulling into the driveway. RP2 49. According to Deputy Kimsey,

> We approached the shop or the barn area where Jeff Johnson lives and when we were walking up to the door, I think the Centralia officers were calling out for Jeff Johnson. Jeff was coming out and at the same time there was a little Mustang Capri that pulled into the driveway.

RP2 49. Later, on cross-examination Deputy Kimsey was asked if the Centralia officers went into the barn at after arriving and calling out for Johnson. RP2 52. Deputy Kimsey replied, "No, not that I saw." RP2 52. Deputy Kimsey related he remembered Johnson

"coming out to the doors of the barn and at that time is when I focused on the guy pulling into the driveway." RP2 52. Again, this is unequivocal testimony that at the beginning of their encounter with Johnson he came out to the front of the barn prior to officers entering the barn.

Officer Haggerty gave equivocal testimony regarding the encounter and whether they had stepped into the barn. Initially Officer Haggerty testified they found Johnson in the barn and asked if they could speak to him outside, "and he joined us out between, I am going to call it, between the barn and between the house in the driveway area." RP2 10. This testimony would lead a person to believe that Johnson came out to the officers' location to speak to them. Later on cross-examination when asked if they just called for Johnson from the driveway, Officer Haggerty stated, "No, we went probably a couple feet into the barn to yell to see if he was there." RP2 19. This is an equivocal statement. Officer Haggerty does not testify that the officers went into the barn. He testifies that they "probably" stepped in a couple feet. This is contrary to the other officers' unequivocal testimony that they did not go into the barn.

Johnson and one of his witnesses testified that Officer Withrow and Officer Haggerty went into the barn. RP2 65, 70. Ms.

Hamilton's testimony does not make sense in light of even Mr. Johnson's testimony. Ms. Hamilton stated she saw the two guys (Officer Withrow and Officer Haggerty) from the Esclade go into the barn through the tack room and then she did not see them again. RP2 65. But even Johnson's testimony, if believed, had the officers entering the barn, then everyone exiting the barn to talk. RP2 70-71.

Finding of Fact Six states, "When nobody responded to their presence, Officers Haggerty and Withrow approached the garage and were able to summon Johnson from within." CP 29. This Court defers to the trial court regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. at 618. The trial court also held, which Johnson has not assigned error, Finding of Fact seven, "Johnson was asked to step outside, which he complied." CP 29. If the officers approached the garage, the officers were able to summons Johnson from within and he was then asked to step outside, it is clear that the officers are outside while this is all occurring, which is consistent with the testimony the trial court clearly believed.

Having inconsistent testimony does not mean there is not substantial evidence. Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). A fair-minded person, who is rational, can easily be persuaded that the two officers who gave unwavering, consistent, unequivocal testimony were telling the trial court the facts as they occurred on January 22, 2014. A fair-minded person could believe that Officer Haggerty's equivocal testimony was not as persuasive. Further, that same, fair-minded person could see Johnson as having the greatest amount to gain by being less than truthful with his recollection and Ms. Hamilton's testimony did not correlate with any other person's testimony as she did not see the officers talking with Johnson out in front of the barn, which everyone else agreed had happened. There was substantial evidence to support Finding of Fact 6. The officers never entered the barn prior to Johnson exiting it to speak to them regarding their business there that evening.

ii. Johnson's consent to search his home was given knowingly and voluntarily after being properly given his *Ferrier* warnings.

The officers went through the proper procedure and gave the required *Ferrier* warnings prior to entering Johnson's home. Johnson was apprised of all of his rights, gave informed consent and signed the consent to search form prior to entry into the barn.

A knock and talk by the police is inherently coercive to some degree, therefore, the courts have developed requirements that must be followed when obtaining consent from homeowners to search the premises when police employ such investigative tools. *Ferrier*, 136 Wn.2d at 115-19. Therefore, for consent to search a home to be lawful it (1) must be procured prior to entering the home, (2) the person whom consent is sought from must be informed they may lawfully refuse to consent to search the premises, (3) the person must be informed that they can limit the scope of their consent to search to certain area or items, and (4) the person must be told that they may withdraw their consent at any time. *Id.* at 118. Failure by an officer to provide the required warnings, before entering the home, invalidates any consent given. *Id.* at 118-19.

Officer Haggerty, outside of the barn, went over the consent to search form with Johnson. RP2 10-14, 20, 23-24, 27, 33, 73; Ex 4. Officer Haggerty testified that Johnson signed the consent to search from, which lists all of Johnson's *Ferrier* warnings on it. RP2 11; Ex. 4. Officer Haggerty explained,

> Mr. Johnson advised us that he had a twelfth grade education which tells me he knows how to read and write. I review the forms with everybody I give them to. If they have an education of 12th grade or higher, I traditionally let them read it, but I also reiterate the points on there, that this consent is voluntarily, voluntary, you can revoke your consent at anytime, you can limit the scope of our search, you can stop us.

RP2 12. Officer Haggerty testified that Johnson appeared to read the form and while he took longer to read it than most, he signed it. RP2 12. According to Officer Haggerty, "He reviewed it longer than maybe one would normally be reading it, but he understood it at the end when we broke it down and he did sign it." RP2 12.

Officer Haggerty explained that Johnson gave no indication that he was having any difficulty reading the form, if he had, Officer Haggerty would have read the form line by line to Johnson. RP 12-13. Further, Officer Haggery stated he summarized the warnings for Johnson, just as he did for everyone, which he traditionally states, "'If you grant consent, you can say no or you can stop us anytime.

You can limit the scope of our search and, again, you can stop at anytime.'" RP2 13. Officer Haggerty goes through those warnings verbally to make sure the consent is voluntary. RP2 13.

There was no guns drawn, the conversation between Officer Haggerty and Johnson was casual. RP2 14. Officer Haggerty did not threaten Johnson. RP2 15. Johnson did not appear under the influence of intoxicating drugs or liquor. RP2 14-15. Officer Haggerty did tell Johnson if he cooperated he could sleep in his own bed that night. RP2 15. The Consent to Search form goes through all the required warnings. Ex. 4. At the end, it states. "I HEREBY KNOWLING, VOLUNTARILY, WITHOUT ANY THREATS OR COERCION, FREELY GIVE THIS CONSENT TO SEARCH." Ex. 4. The form is dated 1/22/14 and signed by Johnson. RP2 84; Ex. 4.

Johnson argues that the consent was not valid because the officers gave a thinly-veiled threat that they would arrest him if he did not cooperate. Brief of Appellant 20. A threat, Johnson argues, officers could not actually take action upon because they were outside their jurisdiction. *Id.* at 21. This, according to Johnson, created an environment that was so coercive that Johnson's consent could not be voluntary. *Id.* First, even if the Centralia

officers lacked official jurisdiction in the county, there was a Lewis County Sheriff's Deputy present, who could have arrested Johnson had probable cause arisen. The jurisdictional argument is a red herring.

The officers were upfront that they were looking for a considerable amount of methamphetamine that they believed Johnson had. RP2 10. Any reasonable person would believe that if an officer found multiple ounces of methamphetamine in one's residence that they would likely be going to jail. Officer Haggerty was explaining to Johnson that what they were really after was Johnson's source and if he cooperated, allowed them to search the residence, they would not arrest him and take him to jail that night. RP2 10-11, 15. Officer Haggerty described Johnson's demeanor, "Very relaxed. He was being very cooperative as he did in the future after this case, too, very relaxed and forthcoming, very respectful." RP2 15. This is not coercive environment in which invalidates consent. Johnson's self-serving testimony to the contrary was clearly not persuasive to the trial court. RP2 73-74.

The consent Johnson gave to search his home was knowingly, voluntarily, and intelligently given, with full knowledge of his right to limit and revoke his consent, as required by *Ferrier.*

Johnson was not in an unduly coercive environment which would negate his consent. The trial court's conclusion that the warnings were properly given and consent was valid is supported by the record and this Court should affirm the trial court. Johnson's conviction should be affirmed.

IV. CONCLUSION

Johnson knowingly, voluntarily and freely gave consent to search his residence on January 22, 2014. This was evidenced by the Consent to Search form he signed, outside of his residence. This Court should affirm the trial court's findings and conclusions from the CrR 3.6 Hearing and Johnson's conviction for Possession of Methamphetamine with Intent to Deliver.

RESPECTFULLY submitted this 8th day of February, 2016.

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by:_____
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JEFFREY JOHNSON, Appellant.	No. 47425-5-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 8, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: Ltabbutlaw@gmail.com.

DATED this 8th day of February, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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